84-661

No. .....

In The

Supreme Court of the United States

October Term, 1984

HOWARD VIRGIL LEE DOUGLAS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,
and DAVID H. BRIERTON,
Superintendent of Florida State Prison,

Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER ON JURISDICTION

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QUESTION PRESENTED

WHETHER A CRIMINAL TRIAL MAY BE CLOSED TO THE GENERAL PUBLIC UPON THE REQUEST OF THE PROSECUTION OVER A DEFENDANT'S OBJECTIONS WITHOUT ANY DEMONSTRATION THAT CLOSURE WAS NECESSITATED BY SOME OVERRIDING GOVERNMENTAL INTEREST.

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I.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at *Douglas v. Wainwright,* 739 F.2d 531 (11th Cir. 1984). A-1-6. That decision reinstated the panel opinion in *Douglas v. Wainwright,* 714 F.2d 1532 (11th Cir. 1983) after this Court granted the petitions for certiorari

and remanded for further consideration in light of *Waller v. Georgia*, 467 U.S. —, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) and *Strickland v. Washington*, 466 U.S. —, 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984). *Douglas v. Wainwright*, — U.S. —, 104 S.Ct. 3575, — L.Ed.2d —. The original opinion of the United States Court of Appeals reviewed the judgment of the district court reported at *Douglas v. Wainwright*, 521 F.Supp. 790 (M.D. Fla. 1981). Opinions of the Supreme Court of Florida are reported at *Douglas v. State*, 328 So.2d 18 (Fla. 1976), *cert. den.* 429 U.S. 871 (1976) and *Douglas v. State*, 373 So.2d 895 (Fla. 1979).

II.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit by a two-to-one decision, on August 1, 1984, on remand from this Court, reinstated the prior panel opinion of September 19, 1983, appearing at *Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir. 1983) and issued its judgment in the cause as mandate that date. On August 7, 1984, the state filed a motion to recall mandate in order to file a timely petition for writ of certiorari in this Court. On August 30, the United States Court of Appeal entered an order recalling the mandate until October 1, 1984, to allow for a timely petition for certiorari.

On September 28, 1984, a copy of the state's petition for writ of certiorari to the Eleventh Circuit Court of Appeals was received by cross-petitioner.

The jurisdiction of this Honorable Court is invoked pursuant to Title 28 U.S.C. Sec. 1254.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment VI of the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for this defense."

Amendment XIV of the Constitution of the United States provides *inter alia,* that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 28 U.S.C. Sec. 2254(a) provides that:

> "The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

IV.

STATEMENT OF THE CASE

The pertinent facts material to consideration of the question presented are identical to those appearing in our first cross-petition in Case No. 83-995 and will not be needlessly repeated. This Court on July 5, 1984, granted the State's petition in Case No. 83-817 for a writ of certiorari, vacated the judgment of the Court of Appeals on the ineffective assistance of counsel issue and remanded the cause for further consideration in light of *Strickland v. Washington*, 466 U.S. —, (1984). This Court also granted our petition in Case No. 83-995, vacated the judgment of the Court of Appeals on the public trial issue and remanded for further consideration in light of *Waller v. Georgia*, 467 U.S. —, (1984).

On remand, the Court of Appeals, on August 1, 1984, reaffirmed its judgment on both issues and reinstated the original panel opinion. A-1-6.

V.

BASIS OF FEDERAL JURISDICTION

The basis of federal jurisdiction in the Court of first instance was a petition for writ of habeas corpus filed pursuant to Title 28 U.S.C. Sec. 2254.

VI.

REASONS FOR GRANTING THE WRIT

The question presented by this petition necessitates the attention of this Court in order to ensure that rights

guaranteed by the Sixth and Fourteenth Amendments to the Constitution are not compromised by the failure to comply with the principles of law articulated in *In re Oliver*, 333 U.S. 257 (1948), *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), *Press-Enterprise Co. v. Superior Court*, 464 U.S. —, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984), and *Waller v. Georgia*, 467 U.S. —, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

The right to a public trial is one of the most cherished liberties guaranteed us by the Bill of Rights. To take that right from a man facing the ultimate penalty—death—strikes at the very heart of the awesome responsibility citizens repose in our government.

At the heart of the purpose of public trial is that "[o]penness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously . . ." *Gannett Co. v. DePasquale, supra* at 383.

More recently this Court expressed that "in *criminal trials* in particular" there is a presumption of openness from back to "the time when our organic laws were adopted . . . both here and in England." *Globe Newspaper Co. v. Superior Court, supra.*

This case presents three questions: First, there is a need to make clear under what circumstances a trial can be closed over the objection of the accused when one witness is testifying at the actual testimonial stage of the proceeding to determine guilt or innocence and punishment of

life or death. Second, there is a need to make clear how the public trial guarantee is to be applied when only a limited segment or class of persons are allowed to remain instead of total closure. Third, there is a need to set out the specific reasons which would justify a trial being closed over the accused's objection. Is protection of the witness from unnecessary insult to her dignity a valid reason to close a portion of the trial?

From these questions it is obvious that when analyzed in the context of the opinion of the lower court with this Court's unbroken view to open trials that if the lower court's opinion is allowed to stand public trials will be a thing of the past. The exclusion herein surrounded the "sole eyewitness to the murder and the witness on whose testimony the judge relied on in finding the one aggravating circumstance used to justify imposition of the death penalty." *Douglas v. Wainwright,* 714 F.2d 1532 at 1541. "[H]er testimony was crucial to say the least." *Id.*

The Court of Appeals mistakenly compares the length of exclusion in *Waller* at a pre-trial suppression hearing with the fact that closure here only surrounded one witness during trial to justify the exclusion. Clearly, the dangers of closure during the testimony of the sole eyewitness is of greater impact than testimony during a pretrial suppression hearing. What impressions were left with the jurors from partial closure in this case? Did they believe that this testimony deserved special protection, or undue emphasis, or more credibility than other witnesses? Did the jurors share a special anguish for the victim's family who were allowed to remain? These questions cannot be answered.

It is not contended that this case was a "Star Chamber" proceeding but a more subtle and insidious deprivation of a public trial. To allow the attendants of a criminal trial to be selected *sua sponte* by the trial judge deftly scalpels the term "public" to mean something quite different from public attendance. Stated otherwise, "[i]t is not essential to the right of attendance that a person be a relative of the accused, an attorney, a witness, or a reporter for the press, nor can these classes be taken as the exclusive representatives of the public." *Davis v. United States,* 249 F. 394 (8th Cir. 1917).

This Court has recognized that the press has no constitutional access superior to those enjoyed by ordinary citizens. *Saxebe v. Washington Post Co.,* 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974). *Pell v. Procunier,* 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d at 495 (1974). Nor can the press, as the alter ego of the citizenry, assure the purposes of the public trial guarantee and elevate a closed proceeding to the open judicial forum intended by the Framers of the Sixth Amendment.

By allowing the type of closure here, special attention is drawn to the witness. Those allowed to remain after exclusion could very well subvert the alleged purpose of the closure. Surely, the nervous or embarrassed witness is better protected and shielded by the public, many of whom would be friends of or in sympathy with the witness. On the other hand, an exclusion order limited to family could create a more hostile atmosphere depending upon the size and number of a defendant's family.

How is a court to determine who may remain and who must leave? Should attorneys not participating in the trial be excluded? Should law students be excluded?

Should journalism students be excluded? Members of the legislature studying the judicial functions? How and on what basis can one draw a legal distinction between members of the public? A, B, and C may stay, but D may not? The perils of this type of closure become obvious.

Again it is clear that the Court of Appeals has mistakenly construed *Waller* to stand for the proposition that a trial can be elevated to public when selected few are allowed to remain.

The lower court incorrectly justifies the partial closure in this case by allowing the exclusion of the general public to protect the dignity of the witness. Protection of the witness from unnecessary insult to her dignity has no valid basis in law. Kindness and compassion are indeed worthy aims to all parties to a criminal trial. The witness was a mature woman with two children. *Douglas v. Wainwright, supra* at 1536. A multitude of criminal trials present embarrassing testimony on the part of witnesses. The mere fact that testimony *could be* embarrassing does not limit itself to this case. *Douglas v. Wainwright, supra* at 1537. If potential testimony could be embarrassing to a witness then public trials would soon be unusual and mere history. The trial court undoubtedly acted out of sympathy for the witness, an objective that could have been totally well motivated. However, a capital trial or any criminal trial does not have as its focal point the comfort and insulation of potentially embarrassing testimony at the sacrifice of an accused's constitutional rights. The exclusion, without reasoned inquiry of the witness and others, makes it impossible to determine whether manifest necessity required the parameters of closure in this case or a need for any closure. And even if this interest may

sometimes allow partial closure, the total absence of any reasoned findings prevents a founded justification for the deprivation of the Sixth Amendment guarantee.

The failure of the Court of Appeals to follow this Court's decisions is troublesome in the context of the Sixth Amendment. It creates uncertainty over the guidelines surrounding the closure of a criminal trial and raises the likelihood of erroneous decisions in future cases. The action of the Court of Appeals is inconsistent with the Sixth Amendment and would erode by attrition the right of a public trial.

CONCLUSION

This Court has continually applied the principle to openness of criminal proceedings. The Court previously granted the writ of certiorari because of the important Sixth Amendment questions presented by the closure in this case. The need to grant the writ again is manifest because if the judgment of the lower court is allowed to stand the right to a public trial is seriously threatened.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5927

HOWARD VIRGIL LEE DOUGLAS,

Petitioner-Appellant,

v.

LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, and DAVID H. BRIERTON, Superintendent of Florida State Prison at Starke, Florida,

Respondents-Appellees.

Appeal from the United States District
Court for the Middle District of Florida

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

(August 1, 1984)

Before RONEY and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

The Supreme Court granted the petition for writ of certiorari in this case, vacating our judgment in *Douglas v. Wainwright,* 714 F.2d 1532 (11th Cir. 1983), and remanded for further consideration in light of *Waller v. Georgia,* 52 U.S.L.W. 4618 (May 21, 1984) and *Strickland v. Washington,* 52 U.S.L.W. 4565 (May 14, 1984). Because we find that *Waller* and *Strickland* do not significantly change the basis of our holding in *Douglas,* we continue to abide by our prior decision.

I. THE PUBLIC TRIAL ISSUE

In *Douglas,* as did the Supreme Court in *Waller,* we looked to the Court's prior holdings on the first amendment right to attend criminal trials for guidance in deciding the scope of a defendant's sixth amendment right to a public trial. We identified several purposes of the public trial guarantee: allowing the public to see that a defendant is fairly dealt with, encouraging trial participants to perform their duties more conscientiously, discouraging perjury, and bringing forth witnesses who might not otherwise testify. 714 F.2d at 1541-42. The Court's opinion in *Waller* focused on basically on the same aims of the guarantee as those identified in *Douglas.* 52 U.S.L.W. at 4619-20.

Likewise, we find *Waller* and *Douglas* in agreement as to the stringent test that must be met for a complete closure to be justified. In *Douglas,* the panel relied on *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982), in concluding that complete closure is "proscribed absent a most compelling justification," 714 F.2d at 1540, and that a court must hold a hearing and articulate specific findings before ordering either a total or partial closure, *id.* at 1545. The *Waller* Court articulated a very similar test:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

— U.S. at —, 104 S.Ct. at 2215 (quoting *Press-Enterprise Co. v. Superior Court,* — U.S. —, — - —, 104 S.Ct. 819, 824, 78 L.Ed.2d 629 (1984)).

The Court further noted that the test articulated in *Waller* was in accord with its holding in *Globe Newspaper Co.*, the case relied upon by the panel in *Douglas*.

The different results in *Douglas* and *Waller* are thus not attributable to the application of differing legal standards, but to the application of the same legal standards to dissimilar facts. The most important distinguishing factor is that *Waller* involved a total closure, with only the parties, lawyers, witnesses, and court personnel present, the press and public specifically having been excluded, while *Douglas* entailed only a partial closure, as the press and family members of the defendant, witness, and decedent were all allowed to remain. Moreover, the closure in *Waller* was for the entire seven days of the suppression hearing although the playing of the disputed tapes lasted only two-and-one-half hours, whereas in *Douglas* the partial closure was limited to the one witness' testimony. *Douglas,* therefore, presented this Court with a fact situation different and unique from that faced by the *Waller* Court.

Because only a partial closure was involved in *Douglas,* we relied upon the binding precendent of *Aaron v. Capps,* 507 F.2d 685 (5th Cir. 1975),[1] which had held that where a partial closure is involved, a court must look to the particular circumstances to see if the defendant still received the safeguards of the public trial guarantee. *Id.* at 688. In *Aaron,* the court held that no constitutional viola-

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[1] The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

tion had occurred because, *inter alia,* members of the press and the defendant's relatives and clergymen were present at the trial. As in *Aaron,* the *Douglas* panel found that the impact of the closure was "not a kind presented when a proceeding is totally closed to the public, 714 F.2d at 1544, and therefore only a "substantial" rather than "compelling" reason for the closure was necessary. *Id.* The penal further found that a substantial reason—protection of the witness from unnecessary insult to her dignity—existed that justified the partial closure. *Id.* at 1544-45.

Douglas thus involved an application of the general sixth amendment public trial guarantee to the specific situation of a partial closure, a situation not addressed in *Waller.* We do not read *Waller* as disapproving of *Aaron's* adaptation of the general standards governing closures, standards on which *Douglas* and *Waller* are in accord,[2] to a case where only a partial closure is involved and at least some access by the public is retained. Consequently, we reaffirm the denial of habeas relief on the public trial issue.

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[2] As did the *Waller* court, the *Douglas* panel found that "an opportunity to be heard and adequate findings are required where any closure of the trial is contemplated and the defendant objects and requests an opportunity to be heard." 714 F.2d at 1546. *See Also Waller,* 52 U.S.L.W. at 4619. The defendant in *Douglas,* however, had failed to specifically object to the absence of a hearing or findings, resulting in procedural default. 714 F.2d at 1546; *see also Wainwright v. Sykes,* 433 U.S. 72 (1977).

II. THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

The Court also remanded for further consideration in light of its holding in *Strickland v. Washington,* 52 U.S.L.W. 4565 (May 14, 1984). In the panel opinion we held that counsel's performance at the penalty phase constituted ineffective assistance warranting habeas relief.

In *Washington,* the Court idetnified two components of a general ineffective assistance of counsel claim: the defendant must demonstrate (1) that counsel's performance "fell below an objective standard of reasonableness," *id.* at 4570, and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 4572. Moreover, the defendant must satisfy both the performance and prejudice prongs to be entitled to relief. *Id.* at 4573.

In the panel opinion, we found that defense counsel's performance had fallen below a standard of reasonableness; indeed, we observed that "counsel's ineffectiveness cries out from a reading of the transcript." 714 F.2d at 1557. The first prong of the *Washington* test was thus satisfied in *Douglas.*

As to the prejudice prong, we noted in our opinion that *Washington* was before the Supreme Court and that the circuits were in conflict as to what standard of prejudice was to be used. We further explained, however, that we did not need to withhold our decision until the Supreme Court decided *Washington,* because "under virtually any standard, prejudice is evident on the face of the record." *Id.* Later in the opinion, we expressly stated that counsel's ineffectiveness created a "great 'likelihood

that counsel's inadequacy affected the outcome of the trial,'" *Id.* at 1558, thus satisfying a standard even more strict that *Washington's* "reasonable probability" standard, *see* 52 U.S.L.W. at 4572. We therefore reaffirm our original holding that the district court erred in denying habeas corpus relief on the ineffective assistance of counsel claim.

For the foregoing reasons the panel opinion is reinstated.

No. 81-5927—*Douglas v. Wainwright*

RONEY, Circuit Judge, dissenting

I dissent for the reasons set forth in my dissent to the original panel opinion. *Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir. 1983).